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SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO
AMEND RULE 68 OF THE ARIZONA
RULES OF CIVIL PROCEDURE.

Supreme Court No. R 06-____

**Petition to Amend Rule 68 of the
Arizona Rules of Civil Procedure**

Pursuant to Arizona Supreme Court Rule 28, the State Bar of Arizona respectfully petitions this Court to amend Rule 68 of the Arizona Rules of Civil Procedure to promote settlement of civil cases. The proposed amendment modifies the procedure for disposing of claims for attorneys' fees and grants offerors the power to transmit apportioned offers to multiple parties. This petition is supported by the accompanying memorandum and proposed text of the amendments to Rule 68 of the Arizona Rules of Civil Procedure attached as Appendix A.

1 Memorandum re Amendment to Rule 68

2 Introduction: Formation and Work of the Civil Practice and Procedure

3 Subcommittee. In July 2002, the State Bar of Arizona Civil Practice and Procedure
4 Committee formed a subcommittee¹ to study and report concerning Ariz.R.Civ.Proc. 68
5 (offers of judgment). During late 2002 and throughout 2003 and 2004, the subcommittee
6 considered the operation of and changes to Rule 68. In December 2003, after considering
7 several draft revisions, the subcommittee submitted proposed revisions to the Civil Practice
8 and Procedure Committee of the State Bar of Arizona. In broad summary, those revisions:
9 (a)(i) deleted the current version of Ariz.R.Civ.Proc. 68(c), which describes procedures for
10 cases in which an award of attorneys' fees has been sought and (ii) adopted the 1990
11 version of the provision regarding attorneys' fees (subsection (c)(1)); and, (b) added
12 provisions allowing for joint offers and apportioned offers.

13 The full Committee considered those revisions in March 2004. In general, the
14 Committee endorsed the revisions, but believed that the provision regarding attorneys' fees
15 should be given more attention. In November 2004, the Committee again considered
16 proposed revisions from the subcommittee (Working Draft No. 10). The Committee
17 suggested refinements to the provisions dealing with attorneys' fees. In April and
18 November 2005, the subcommittee reported back to the Committee (Working Draft No.
19 13), which endorsed the proposed revisions except for the operation of joint, apportioned
20 offers (Rule 68(f)) and one portion of the comment. In March 2006, the Committee
21 approved the proposed, final version (Working Draft No. 14) with the exception of one
22 revision to Rule 68(f). In April 2006, the Committee approved the full text of the revised
23 rule and comment.

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26
27 ¹ Hon. Rosa Mroz, Hon. Peter Swann, Debra Hill, Frank Moskowitz, James Kloss, Scott Klundt, and
28 Shawn Aiken (chair).

1 **Summary of Proposed Revisions to the Rule.** The Arizona Supreme Court revised
2 Rule 68 in 1989, 1990, and 1992. After over ten years of operation under the amended rule,
3 several issues have arisen. First, the 1992 amendments authorizing partial acceptances of
4 offers (while allowing for resolution of the question of attorneys' fees by the court) make
5 the final outcome too uncertain. That uncertainty constitutes an economic deterrent to
6 settlement. Second, offerors lack the power to make contingent offers in multi-party, multi-
7 claim cases. The proposed amended rule addresses these two primary (and other)
8 shortcomings, which this petition describes more fully below.

9 **Background.: Current Operation of Rule 68.** Rule 68 encourages settlements and
10 avoids protracted litigation by authorizing an offer of judgment before trial. The rule allows
11 either party to serve upon the adverse party an offer to allow judgment to be entered in
12 accordance with the terms of the offer. Ariz.R.Civ.Proc. 68(a). If the offeree accepts the
13 offer, the court will later enter a corresponding judgment. R. 68(b). If the offeree rejects
14 the offer and does not later obtain a more favorable judgment in the case, the offeree must
15 pay sanctions to the offeror. R. 68(d). These sanctions include reasonable expert witness
16 fees and double the taxable costs incurred by the offeror after making the offer, as well as
17 post-offer prejudgment interest on unliquidated claims. Id.

18 If the case involves attorneys' fees, then Rule 68(c)(1) directs that the offer shall set
19 forth separately the amount of any monetary award to be made on the asserted causes of
20 action and the amount of attorneys' fees to be awarded if the offer is accepted. The offeree
21 then faces three options: (1) reject the offer, (2) fully accept the offer, or (3) partially accept
22 the offer insofar as it concerns the monetary award on the causes of action while reserving
23 the right to apply to the court for a determination of the amount of attorneys' fees, if any, to
24 be awarded. R. 68(c)(2), and (3). In the latter case, after the court determines the fee issue,
25 judgment is entered reflecting that determination along with the parties' agreed-upon
26 monetary award. R. 68(c)(3).

1 **Background: Recent Revisions to the Rule.** In 1937, Rule 68 was adopted with
2 the original Federal Rules of Civil Procedure. For decades, the rule was criticized because
3 defendants could not put a plaintiff at risk for paying the defendant's post-offer attorney
4 fees as well as its costs. See John E. Shapard, Federal Judicial Center, *Likely Consequences*
5 *of Amendments to Rule 68, Federal Rules of Civil Procedure* 1, 31 (1995). The rule fell
6 into disuse. In fact, the advisory committee notes to the 1983 amendments to Rule 68
7 observed that the rule "has rarely been invoked and has been considered largely ineffective
8 as a means of achieving its goals." Other commentators disagreed because, they observed,
9 the use of Rule 68 was probably under-reported. See Ian H. Fisher, *Federal Rule 68, A*
10 *Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DePaul Bus.L.J. 89, 89
11 (2001)(arguing that an offer that is not accepted is not filed with the court; therefore, it is
12 impossible to determine accurately how often Rule 68 is used).

13 For decades, the Arizona version of Rule 68 mirrored (more or less) its federal
14 counterpart – and its demerits. In 1987, the federal rule was last amended. A few years
15 later, the state rule began to diverge markedly from the federal rule. The first major
16 amendments to the Arizona version of the rule addressed many of the shortcomings cited by
17 commentators and practitioners. For example, by amendment to Rule 68 in 1989, the
18 Arizona Supreme Court authorized an offer of judgment by *either* party. The revision in
19 1990 outlined the procedure in cases involving claims for attorneys' fees. And, in 1992, the
20 amendments introduced the notion of offers addressing damages and further revised the
21 attorneys' fees provision to allow for partial acceptances of offers together with
22 determination of the question of attorneys' fees by the court.

23 **The Proposed Rule 68(b): Attorneys' Fee Provision.** In 2002, the Arizona State
24 Bar Civil Practice and Procedure Committee asked whether the amended rule was working.
25 The subcommittee charged with review of the rule determined that, among other things, the
26 1992 amendments outlining procedures in actions involving claims for attorneys' fees were
27 not working. For one thing, in cases involving claims for attorneys' fees, the rule allowed
28 partial acceptances of offers, which meant that offerors could receive an acceptance of the

1 principal portion of the claim, but then faced not only litigation over the question of
2 attorneys' fees but also an uncertain outcome. Many members of the bar told the
3 subcommittee that the uncertainty and lack of finality limited use of the rule. The current
4 proposal balances the desire to include attorneys' fees in the calculus but avoids the less
5 workable, uncertain partial acceptances now allowed under the rule. Under the proposed
6 rule, the offer includes consideration for the offeree's attorneys' fees unless stated
7 otherwise. See Draft Rule 68(b) ("If any portion of an offer made under this Rule is for the
8 entry of a monetary judgment, the monetary award to be made shall be set forth in the offer
9 as a specifically stated sum, which shall be inclusive of all damages, taxable court costs,
10 interest, and attorneys' fees, if any, sought in the case. The offeror may choose to exclude
11 an amount for attorneys' fees, but must specifically so state in the offer. If the offeror
12 excludes an amount for attorneys' fees in the offer, and the offeree accepts the offer, then
13 either party may apply to the court for an award of attorneys' fees, if otherwise allowed by
14 statute, contract or otherwise."). The rule simplifies and shortens the current procedure and
15 thereby encourages pre-trial settlement.

16 **The Proposed Rule 68(f): Conditional Apportioned Offers.** The second practical
17 issue that arose under any version of the rule was the problematic rejection of
18 unapportioned offers in multi-party cases. In Duke v. Cochise County, 189 Ariz. 35, 41,
19 938 P.2d 84, 90 (1997), the court concluded that unapportioned joint offers of judgment
20 were invalid for purposes of imposing sanctions under Rule 68(d) regardless of the outcome
21 at trial. The use of conditional offers to deal with the problem seemed foreclosed by the
22 Duke opinion. See 35 Arizona Attorney 28 ("It seems likely, however, that the proper
23 interpretation of Duke is that conditional offers are invalid"). The Duke court recognized
24 that unapportioned offers in multi-party cases made each offeree's evaluation difficult, and
25 arguably required each offeree to act in unison, thereby undermining the utility of the rule
26 in multi-party cases. Under the proposed rule, offerors would be allowed to make offers
27 apportioned to each offeree and, more important, conditional upon acceptance by all
28 offerees. See Draft Rule 68 (f) ("Unapportioned offers may not be made to multiple

1 offerees. However, one or more parties may make to two or more other parties an
2 apportioned offer of judgment that is conditioned upon acceptance by all of the offerees.
3 Each offeree may serve a separate written notice of acceptance of the offer. If fewer than
4 all offerees accept, then the offeror may nevertheless enforce any number of the
5 acceptances if (i) the offer discloses that the offeror may exercise this option, and (ii) the
6 offeror serves written notice of final acceptance to the accepting offeree(s) no later than 10
7 days after the expiration of the effective period of the offer.”). Sanctions would apply only
8 to those offerees who rejected the apportioned offer and then failed to meet or beat that
9 offer at trial. *Id.* (“The sanctions provided in this Rule apply to each offeree who did not
10 accept the apportioned offer.”).

11 **Other Changes to the Proposed Rule.** The petition includes the current version of
12 the rule with all of the proposed changes (see Exh. B (redlined text)). After summarizing
13 above the changes to the attorneys’ fees provision (subsection (b)) and the provisions for
14 joint, apportioned offers (subsection (f)), we turn to the other, proposed revisions.

15 **No collateral estoppel effect: subsection (i).** First, the proposed rule adds a new
16 subsection (i) confirming that judgment entered under the rule carries no collateral estoppel
17 effect (“Any judgment entered under this Rule shall not be deemed an adjudication on the
18 merits.”). Although no Arizona court has spoken directly on this issue, this proposed
19 provision squares with the majority rule. *See Modern Views of State Courts as to Whether*
20 *Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect*, 91 A.L.R. 3d
21 1170, 1183-1191 (1979 and 1989 Suppl.). The revision promotes pre-trial resolution by
22 ensuring that the judgment entered under this rule will not preclude later litigation of issues
23 that may have arisen in the litigation but were not actually litigated. On that point, the new
24 provision in subsection (i) squares with Arizona law on issue preclusion. *See Chaney*
25 *Building Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P. 2d 28, 30 (1986)(issue
26 preclusion applies only to issues that are actually litigated). The new provision affirms the
27 reality that, in nearly every case, the consent judgment entered under Rule 68 represents
28 compromise in the midst of litigation rather than full litigation and resolution of issues on

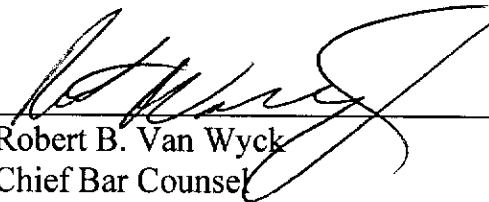
1 the merits.

2 Waiver of objections to forms of the offer. Under current practice, offerees at times
3 wait until the conclusion of the case to attack the validity of the offer on grounds, for
4 example, that the offeror improperly served or wrongly stated the intended terms of the
5 offer. By contrast, under the proposed rule, the offeree must serve written notice of
6 objections "to the validity of the offer" within ten days after service of the offer; the offeree
7 otherwise "waives the right to do so in any proceeding to determine sanctions[.]" See Draft
8 Rule 68(d). The current rule is silent on this point. Under the current rule, therefore, the
9 offeree may attack defects in the offer at the conclusion of the case when, in many cases,
10 the offeror could have corrected the claimed defect following notice from the offeree. The
11 change will result in little if any cost to the parties and, in fact, should result in less
12 litigation because the validity of the offer will be resolved immediately rather than litigated
13 later, which should in turn promote pre-trial settlement of cases.

14 CONCLUSION

15 The State Bar of Arizona respectfully requests that the Court amend Current Rule 68
16 of the Arizona Rules of Civil Procedure in accord with the proposed amendments set forth
17 in Appendix A.

18 RESPECTFULLY SUBMITTED this 27th day of July, 2006.

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APPENDIX A

1 [PROPOSED REDLINE]

2 **Rule 68. Offer of Judgment**

3 (a) **Offer; Time for Making; Procedure.** At any time more than 30 days before the
4 trial begins, any party may serve upon any other ~~the adverse party~~ an offer to allow judgment
5 to be entered in the action ~~in accordance with the terms and conditions specified in the offer,~~
6 ~~plus costs then accrued.~~

7 (b) ~~Contents of Offer Procedure Generally; Contents of Offer; Acceptance; Entry~~
8 ~~of Judgment on Offer.~~ In cases in which attorneys' fees have not been sought, If any
9 portion of an offer made under ~~pursuant to~~ this Rule is for the entry of a monetary judgment,
10 the monetary award to be made shall be set forth in the offer as a specifically ~~stated~~ sum, which shall be inclusive of all damages, taxable court costs, interest, and attorneys fees, if
11 any, sought in the case. The offeror may choose to exclude an amount for attorneys fees, but
12 must specifically so state in the offer. If the offeror excludes an amount for attorneys fees in
13 the offer, and the offeree accepts the offer, then either party may apply to the court for an
14 award of attorneys fees, if otherwise allowed by statute, contract or otherwise. The offer need
15 not be apportioned by claim.

16 (c) **Acceptance of Offer; Entry of Judgment.** If, while such an offer remains
17 effective within the meaning of this rule, the offeree ~~adverse party~~ serves written notice that
18 the offer is accepted, then ~~either party may then~~ file the offer together with proof of
19 acceptance, thereof ~~and a judgment complying with the requirements of Rule 58(a) shall be~~
20 entered.

21 (e) **Procedure in Actions Involving Claims for Attorneys' Fees.**

22 (1) ~~Contents of Offer.~~ If an award of attorneys' fees has been sought in the action,
23 any offer made pursuant to this Rule shall set forth separately, as a specific stated
24 sum, (i) the amount of any monetary award to be made on the causes of action
25 asserted, and (ii) the amount of attorneys' fees to be awarded if the offer is
26 accepted.

27 (2) ~~Full Acceptance of Offer; Procedure.~~ If, while such an offer remains effective
28 within the meaning of this Rule, the ~~adverse party~~ serves written notice that the
offer is accepted in its entirety, either party may file the offer together with proof of
acceptance thereof and a judgment complying with the requirements of Rule 58(a)
shall be entered.

(3) ~~Partial Acceptance of Offer; Procedure.~~ If, while such an offer remains
effective within the meaning of this Rule, the adverse party serves written notice
that the portion of the offer stating the monetary award to be made on the causes of
action asserted is accepted, either party may file the offer together with proof of
acceptance thereof and may apply to the court for a determination whether
attorneys' fees should be awarded and, if so, the amount thereof. Following such
determination, a judgment shall be entered complying with the requirements of
Rule 58(a).

1 **(d) Rejection of Offer; Waiver of Objections. Not Accepted; Sanctions.** An offer
2 that which is not accepted while it remains effective within the meaning of this Rule shall
3 be deemed rejected. withdrawn and Evidence thereof of the rejected offer shall not be
4 admissible except in a proceeding to determine sanctions under this Rule. If the offeree has
5 any objection(s) to the validity of the offer, the offeree must serve upon the offeror, and
6 within ten days after service of the offer, written notice of any such objection(s). Unless the
7 offeree notifies the offeror of any objection as provided under this subsection, the offeree
8 waives the right to do so in any proceeding to determine sanctions under this rule. If the
9 judgment finally obtained is equal to, or more favorable to the offeror than, the offer, the
10 offeree must pay, as a sanction, those reasonable expert witness fees and double the taxable
11 costs of the offeror, as defined in A.R.S. § 12-332, incurred after the making of the offer,
12 and prejudgment interest on unliquidated claims to accrue from the date of the offer. If the
13 offer made included amounts for costs or attorneys' fees, an award of sanctions under this
14 Rule shall only be made if the judgment finally obtained, exclusive of any attorneys' fees or
15 costs awarded and included therein, is equal to, or more favorable to the offeror than, that
16 portion of the offer stating the award to be made on the causes of action asserted.

17 **(e) Multiple Offerors.** Multiple parties may make a joint unapportioned offer of
18 judgment to a single offeree.

19 **(f) Multiple Offerees.** Unapportioned offers may not be made to multiple offerees.
20 However, one or more parties may make to two or more other parties an apportioned offer of
21 judgment that is conditioned upon acceptance by all of the offerees. Each offeree may serve
22 a separate written notice of acceptance of the offer. If fewer than all offerees accept, then the
23 offeror may nevertheless enforce any number of the acceptances if (i) the offer discloses that
24 the offeror may exercise this option, and (ii) the offeror serves written notice of final
25 acceptance no later than 10 days after the expiration of the effective period of the offer. The
26 sanctions provided in this Rule apply to each offeree who did not accept the apportioned
27 offer.

28 **(g) Sanctions.** If an offer has been rejected, and the judgment finally obtained other
29 than pursuant to this Rule is equal to, or more favorable to the offeror than, the offer, the
30 offeree must pay, as a sanction, those reasonable expert witness fees and double the taxable
31 costs of the offeror, as defined in A.R.S. § 12-332, incurred after the making of the offer,
32 and prejudgment interest on unliquidated claims to accrue from the date of the offer. If the
33 judgment includes an award of taxable costs or attorneys' fees, only those taxable costs and
34 attorneys' fees determined by the court as having been reasonably incurred as of the date
35 the offer was made shall be considered for purposes of determining whether the judgment is
36 equal to, or more favorable to the offeror than, the offer.

37 **(e)-(h) Effective Period of Offers; Subsequent Offers; Offers on Damages.** The
38 fact that an offer has been made but not accepted does not preclude a subsequent offer. An
39 offer of judgment made pursuant to this Rule shall remain effective for 30 days after it is
40 served, except that (i) an offer which is made within 60 days after service of the summons
41 and complaint shall remain effective for 60 days after service thereof, and (ii) an offer

1 made within 45 days of trial shall remain effective for 15 days after service. If the effective
2 period is enlarged by the court, the offeror may withdraw the offer at any time after
3 expiration of the initial effective period and prior to acceptance of the offer. The fact that
4 an offer has been rejected does not preclude a subsequent offer. When the liability of one
5 party to another has been determined by verdict or order or judgment, but the amount or
6 extent of the liability remains to be determined by further proceedings, the any party
7 adjudged liable may make an offer of judgment, which shall have the same effect as an
8 offer made before trial if it is served within a reasonable time not fewer less than 10 days
9 before prior to the commencement of hearings to determine the amount or extent of
10 liability.

11 (i) Effect of Judgment. Any judgment entered under this Rule shall not be deemed
12 an adjudication on the merits.

2006 Amendment

13 The former subsection (c) regarding attorneys' fees has been deleted. Under the
14 amended rule, unless specifically stated otherwise, all offers include an amount for
15 attorneys' fees if an award of fees has been sought in the action. In determining whether
16 sanctions are appropriate, the court may require a hearing to determine the amount of
17 attorneys' fees reasonably incurred as of the date the offer was made. Cf. Ariz.R.Civ.Proc.
18 54(g)(3). In subsections (e) and (f), provisions for joint and apportioned offers have been
19 added. The "taxable costs" awarded as sanctions under subparagraph (g) would not
20 preclude an award of costs otherwise awardable under A.R.S. §12-341 to the "successful
21 party." Drozda v. McComas, 181 Ariz. 82, 85, 887 P.2d 612, 615 (App. 1995).

22 Subsection (i) clarifies that a judgment entered under this Rule is not intended to
23 have collateral estoppel effect in other litigation because the underlying issues were not
24 actually litigated. See Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573, 716 P.
25 2d 28, 30 (1986)(issue preclusion applies only to issues that are actually litigated).
26 However, a judgment entered under this Rule may be relevant in determining which party
27 "prevailed" or was "successful" for purposes of awarding attorneys' fees. For example, in
28 a contested action arising out of contract, an offer made under this Rule constitutes 'a
written settlement offer' for purposes of A.R.S. §12-341.01(A).

1 [Proposed without redline]

2 **Rule 68. Offer of Judgment**

3 (a) **Time for Making; Procedure.** At any time more than 30 days before the
4 trial begins, any party may serve upon any other party an offer to allow a judgment to be
5 entered in the action.

6 (b) **Contents of Offer.** If any portion of an offer made under this Rule is for the
7 entry of a monetary judgment, the monetary award to be made shall be set forth in the offer
8 as a specifically stated sum, which shall be inclusive of all damages, taxable court costs,
9 interest, and attorneys' fees, if any, sought in the case. The offeror may choose to exclude
10 an amount for attorneys' fees, but must specifically so state in the offer. If the offeror
11 excludes an amount for attorneys' fees in the offer, and the offeree accepts the offer, then
12 either party may apply to the court for an award of attorneys' fees, if otherwise allowed by
13 statute, contract or otherwise. The offer need not be apportioned by claim.

14 (c) **Acceptance of Offer; Entry of Judgment.** If, while an offer remains
15 effective within the meaning of this Rule, the offeree serves written notice that the offer is
16 accepted, then either party may file the offer together with proof of acceptance, and a
17 judgment complying with the requirements of Rule 58(a) shall be entered.

18 (d) **Rejection of Offer; Waiver of Objections.** An offer that is not accepted
19 while it remains effective within the meaning of this Rule shall be deemed rejected.
20 Evidence of the rejected offer shall not be admissible except in a proceeding to determine
21 sanctions under this Rule. If the offeree has any objection(s) to the validity of the offer, the
22 offeree must serve upon the offeror, and within ten days after service of the offer, written
23 notice of any such objection(s). Unless the offeree notifies the offeror of any objection as
24 provided under this subsection, the offeree waives the right to do so in any proceeding to
25 determine sanctions under this Rule.

26 (e) **Multiple Offerors.** Multiple parties may make a joint unapportioned offer of
27 judgment to a single offeree.

28 (f) **Multiple Offerees.** Unapportioned offers may not be made to multiple
offerees. However, one or more parties may make to two or more other parties an
apportioned offer of judgment that is conditioned upon acceptance by all of the offerees.
Each offeree may serve a separate written notice of acceptance of the offer. If fewer than
all offerees accept, then the offeror may nevertheless enforce any number of the
acceptances if (i) the offer discloses that the offeror may exercise this option, and (ii) the
offeror serves written notice of final acceptance no later than 10 days after the expiration of
the effective period of the offer. The sanctions provided in this Rule apply to each offeree
who did not accept the apportioned offer.

(g) **Sanctions.** If an offer has been rejected, and the judgment finally obtained
other than pursuant to this Rule is equal to, or more favorable to the offeror than, the offer,
the offeree must pay, as a sanction, those reasonable expert witness fees and double the
taxable costs of the offeror, as defined in A.R.S. §12-332, incurred after the making of the

1 offer, and prejudgment interest on unliquidated claims to accrue from the date of the offer.
2 If the judgment includes an award of taxable costs or attorneys' fees, only those taxable
3 costs and attorneys' fees determined by the court as having been reasonably incurred as of
4 the date the offer was made shall be considered for purposes of determining whether the
5 judgment is equal to, or more favorable to the offeror than, the offer.

6 (h) **Effective Period of Offers; Subsequent Offers; Offers on Damages.** An
7 offer of judgment made pursuant to this Rule shall remain effective for 30 days after it is
8 served, except that (i) an offer made within 60 days after service of the summons and
9 complaint shall remain effective for 60 days after service, and (ii) an offer made within 45
10 days of trial shall remain effective for 15 days after service. If the effective period is
11 enlarged by the court, the offeror may withdraw the offer at any time after expiration of the
12 initial effective period and prior to acceptance of the offer. The fact that an offer has been
13 rejected does not preclude a subsequent offer. When the liability of one party to another has
14 been determined by verdict or order of judgment, but the amount or extent of the liability
15 remains to be determined by further proceedings, any party may make an offer of judgment,
16 which shall have the same effect as an offer made before trial if it is served within a
17 reasonable time not fewer than 10 days before the commencement of hearings to determine
18 the amount or extent of liability.

19 (i) **Effect of Judgment.** Any judgment entered under this Rule shall not be
20 deemed an adjudication on the merits.

21 2006 Amendment

22 *The former subsection (c) regarding attorneys' fees has been deleted. Under the*
23 *amended rule, unless specifically stated otherwise, all offers include an amount for*
24 *attorneys' fees if an award of fees has been sought in the action. In determining whether*
25 *sanctions are appropriate, the court may require a hearing to determine the amount of*
26 *attorneys' fees reasonably incurred as of the date the offer was made. Cf. Ariz.R.Civ.Proc.*
27 *54(g)(3). In subsections (e) and (f), provisions for joint and apportioned offers have been*
28 *added. The "taxable costs" awarded as sanctions under subparagraph (g) would not*
preclude an award of costs otherwise awardable under A.R.S. §12-341 to the "successful
party." Drozda v. McComas, 181 Ariz. 82, 85, 887 P.2d 612, 615 (App. 1995).

Subsection (i) clarifies that a judgment entered under this Rule is not intended to
have collateral estoppel effect in other litigation because the underlying issues were not
actually litigated. See Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573, 716 P.
2d 28, 30 (1986)(issue preclusion applies only to issues that are actually litigated).
However, a judgment entered under this Rule may be relevant in determining which party
"prevailed" or was "successful" for purposes of awarding attorneys' fees. For example, in
a contested action arising out of contract, an offer made under this Rule constitutes 'a
written settlement offer' for purposes of A.R.S. §12-341.01(A).

April 7, 2006.

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APPENDIX B

1 **Rule 68 [1993 Arizona version - current]. Offer of judgment.**

2 (a) **Offer; Time for Making.** At any time more than 30 days before the trial
3 begins, any party may serve upon the adverse party an offer to allow judgment to be entered
4 in the action in accordance with the terms and conditions specified in the offer, plus costs
5 then accrued.

6 (b) **Procedure Generally; Contents of Offer; Acceptance; Entry of Judgment**
7 **on Offer.** In cases in which attorneys' fees have not been sought, if any portion of an offer
8 made pursuant to this Rule is for the entry of a monetary judgment, the monetary award to
9 be made shall be set forth in the offer as a specific stated sum. If, while such an offer
10 remains effective within the meaning of this rule, the adverse party serves written notice
11 that the offer is accepted, either party may then file the offer together with proof of
12 acceptance thereof and a judgment complying with the requirements of Rule 58(a) shall be
13 entered.

14 (c) **Procedure in Actions Involving Claims for Attorneys' Fees.**

15 (1) *Contents of Offer.* If an award of attorneys' fees has been sought in the
16 action, any offer made pursuant to this Rule shall set forth separately,
17 as a specific stated sum, (i) the amount of any monetary award to be
18 made on the causes of action asserted, and (ii) the amount of attorneys'
19 fees to be awarded if the offer is accepted.

20 (2) *Full Acceptance of Offer; Procedure.* If, while such an offer remains
21 effective within the meaning of this Rule, the adverse party serves
22 written notice that the offer is accepted in its entirety, either party may
23 file the offer together with proof of acceptance thereof and a judgment
24 complying with the requirements of Rule 58(a) shall be entered.

25 (3) *Partial Acceptance of Offer; Procedure.* If, while such an offer
26 remains effective within the meaning of this Rule, the adverse party
27 serves written notice that the portion of the offer stating the monetary
28 award to be made on the causes of action asserted is accepted, either
party may file the offer together with proof of acceptance thereof and
may apply to the court for a determination whether attorneys' fees
should be awarded and, if so, the amount thereof. Following such
determination, a judgment shall be entered complying with the
requirements of Rule 58(a).

(d) **Offer Not Accepted; Sanctions.** An offer which is not accepted while it
remains effective within the meaning of this Rule shall be deemed withdrawn and evidence

1 thereof shall not be admissible except in a proceeding to determine sanctions under this
2 Rule. If the judgment finally obtained is equal to, or more favorable to the offeror than, the
3 offer, the offeree must pay, as a sanction, those reasonable expert witness fees and double
4 the taxable costs of the offeror, as defined in A.R.S. § 12-332, incurred after the making of
5 the offer, and prejudgment interest on unliquidated claims to accrue from the date of the
6 offer. If the offer made included amounts for costs or attorneys' fees, an award of sanctions
7 under this Rule shall only be made if the judgment finally obtained, exclusive of any
8 attorneys' fees or costs awarded and included therein, is equal to, or more favorable to the
9 offeror than, that portion of the offer stating the award to be made on the causes of action
10 asserted.

11 (e) **Effective Period of Offers; Subsequent Offers; Offers on Damages.** The
12 fact that an offer has been made but not accepted does not preclude a subsequent offer. An
13 offer of judgment made pursuant to this Rule shall remain effective for 30 days after it is
14 served, except that an offer which is made within 60 days after service of the summons and
15 complaint shall remain effective for 60 days after service thereof. If the effective period is
16 enlarged by the court, the offeror may withdraw the offer at any time after expiration of the
17 initial effective period and prior to acceptance of the offer. When the liability of one party
18 to another has been determined by verdict or order or judgment, but the amount or extent of
19 the liability remains to be determined by further proceedings, the party adjudged liable may
20 make an offer of judgment, which shall have the same effect as an offer made before trial if
21 it is served within a reasonable time not less than 10 days prior to the commencement of
22 hearings to determine the amount or extent of liability.

23 Amended July 1, 1966, effective Nov. 1, 1966; Sept. 15, 1987, effective Nov. 15, 1987; Feb. 14, 1990, effective May 1, 1990; June 8, 1990, effective
24 Sept. 1, 1990; March 23, 1992, effective June 1, 1992; Sept. 30, 1993, effective Dec. 1, 1992.

Rule 68 [Current federal version].

Offer of judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68 [1990 Arizona version]. Offer of judgment.

At any time more than 30 days before the trial begins, any party may serve upon the adverse party an offer to allow judgment to be entered in the action in accordance with the terms and conditions specified in the offer, with costs then accrued. If an award of attorneys' fees has been sought in the action, the offer shall (a) specify the amount of attorneys' fees to be awarded to the offeror if the offer is accepted; or, (2) specify that the court may determine whether attorneys' fees should be awarded and, if so, the amount thereof in subsequent proceedings; or, (3) specify that the offer as stated includes any attorneys' fees sought in the action. If, while the offer remains effective within the meaning of this Rule, the adverse party serves written notice that the offer is accepted, either party may then file the offer together with proof of acceptance thereof and a judgment complying with the requirements of rule 58(a) shall be entered. An offer which is not accepted while it remains effective within the meaning of this Rule shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding to determine costs. If the judgment finally obtained is equal to, or more favorable to the offeror than the offer, the offeree must pay double the costs of the offeror incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. An offer of judgment made pursuant to this Rule shall remain effective for 30 days after it is served, except that an offer which is made within 60 days after service of the summons and complaint shall remain effective for 60 days after service thereof. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.